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UNITED STATES OF AMERICA  
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10 UNITED STATES DISTRICT COURT

11 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
12

13 UNITED STATES OF AMERICA,  
14 Plaintiff,  
15 v.  
16 GABRIEL ARELLANO-GAETA,  
17 Defendant.  
18

CR No. 08-1446-ODW

AMENDED ORDER DENYING DEFENDANT'S  
MOTION TO DISMISS INDICTMENT DUE  
TO UNLAWFUL DEPORTATION

19 On October 3, 2012, defendant GABRIEL ARELLANO-GAETA filed a  
20 Motion to Dismiss Indictment Due to Unlawful Deportation (the  
21 "Motion"). (CR 22.) Thereafter, the Court reviewed the Motion and  
22 all accompanying materials, including the compact disc that was  
23 lodged concurrently with the Motion. (CR 23.) As set forth in the  
24 October 16, 2012 Order denying the Motion, the Court's review of the  
25 audio record of the hearing before the Immigration Judge ("IJ")  
26 indicated that defendant was aware of his prior conviction for  
27 narcotics sales, was specifically advised of the prior sales  
28 conviction, admitted it, and waived further review. (CR 25.)

1       The Court has now reviewed additional, relevant materials  
2 submitted by the government. These materials included: (1) the  
3 certified Felony Complaint in Los Angeles County Superior Court Case  
4 No. VA088889 (the "Complaint"); (2) the certified Minute Order for  
5 defendant's entry of a guilty plea and sentencing in Case No.  
6 VA088889 (the "Minute Order"); and (3) the certified transcript of  
7 those proceedings on May 23, 2005 (the "Transcript").

8       Based on its consideration of all of the parties' submissions,  
9 the Court further finds as follows:

10       1. While a prior conviction for possession of  
11 methamphetamine, in violation of California Health & Safety Code  
12 § 11377(a), would not have constituted an aggravated felony nor  
13 precluded defendant from relief before the IJ, see United States v.  
14 Munoz-Camarena, 631 F.3d 1028, 1029 n.2 (9th Cir. 2011) ("Simple  
15 possession by itself is not an aggravated felony."), defendant  
16 admitted during his January 9, 2007 immigration hearing that he had,  
17 in fact, been previously convicted of "possession for sale for  
18 cocaine base," which is a violation of California Health & Safety  
19 Code § 11351.5. (Motion, Exhibit B, at 3-4.)

20       2. Defendant's admission before the IJ is consistent with the  
21 certified documents that have been provided to the Court. See  
22 United States v. Bustos-Ochoa, -- F.3d --, 2012 WL 6579556 at \*3, 6-  
23 7 (9th Cir. Dec. 18, 2012) (affirming district court's denial of  
24 analogous motion to dismiss indictment because conviction documents,  
25 although not provided to the IJ, "conclusively established that  
26 Bustos-Ochoa was an aggravated felon," and "an alien who is  
27 statutorily barred from obtaining relief from removal cannot be  
28 prejudiced by an IJ's failure to inform him about the possibility of

1 applying for such relief."). Specifically, Count One of the  
2 Complaint charged a violation of § 11351.5, and Count Two charged a  
3 violation of § 11377(a); and the Minute Order memorialized  
4 defendant's guilty plea to Count One and the dismissal of Count Two.  
5 (Complaint at 1; Minute Order at 2-3.) There were also multiple  
6 references to § 11351.5 during defendant's change of plea colloquy  
7 before the Hon. Marcelita V. Haynes, Los Angeles County Superior  
8 Court Judge, on May 23, 2005. For example:

9 **THE COURT:** Mr. Arellano, how do you plead to felony  
10 complaint VA088889 to the allegation in count 1 that on or  
11 about May 7<sup>th</sup>, 2005, in the county of Los Angeles, you  
violated Health and Safety Code Section 11351.5,  
possession for sale of cocaine base?

12 **THE DEFENDANT:** No contest.

13 **THE COURT:** Do you understand based on that plea the court  
14 is going to find you guilty?

15 **THE DEFENDANT:** Yes, ma'am.

16 **THE COURT:** . . . Court accepts the plea, finds - finds the  
defendant guilty as alleged in count 1.

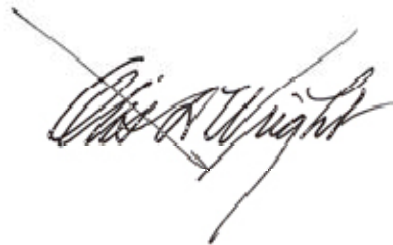
17 (Transcript at 7.)

18 3. Defendant's prior conviction that served as the basis for  
19 his deportation, therefore, was a categorical aggravated felony  
20 under 8 U.S.C. § 1101(a)(43)(B). See United States v. Morales-  
21 Perez, 467 F.3d 1219, 1223 (9th Cir. 2006) ("[T]he district court  
22 correctly determined that a conviction under section 11351.5  
23 categorically qualifies as a drug trafficking offense under the  
24 Sentencing Guidelines."); U.S.S.G. § 2L1.2, Application Note 3(A)  
25 ("aggravated felony" has the same meaning given that term in 8  
26 U.S.C. § 1101(a)(43)).

27 4. Thus, defendant has failed to meet his burden under the  
28 third prong of 8 U.S.C. § 1326(d) because he cannot demonstrate

1 prejudice stemming from any alleged defects in his underlying  
2 removal proceedings. See United States v. Ubaldo-Figueroa, 364 F.3d  
3 1042, 1050 (9th Cir. 2004) (defendant must show "plausible" grounds  
4 for relief from deportation in order to establish prejudice); United  
5 States v. Ramos, 623 F.3d 672, 684 (9th Cir. 2010) ("If the  
6 defendant is barred from receiving relief, his claim is not  
7 plausible.") (internal quotation marks and citation omitted). The  
8 typographical errors found in the Abstract of Judgment and the  
9 Notice to Appear do not change this result. (Motion, Exhibits A,  
10 C.) Because defendant is a categorical aggravated felon, he is  
11 statutorily ineligible for any discretionary relief from deportation  
12 at a matter of law. See 8 U.S.C. § 1229b(a) (providing for  
13 cancellation of removal for certain lawful permanent residents not  
14 convicted of an aggravated felony).

15 Accordingly, the Motion is **DENIED**.

16  
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18  


19 February 25, 2013  
20 DATE

\_\_\_\_\_  
21 THE HONORABLE OTIS D. WRIGHT II  
22 UNITED STATES DISTRICT JUDGE  
23

24 Presented by:

25 /s/

26 \_\_\_\_\_  
27 TERRENCE P. MANN  
28 Assistant United States Attorney  
Date: February 22, 2013